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NO. 82-165

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

STATE OF WASHINGTON, ex rel.
SHANA MARIE GOODNER, a minor,
by her Guardian ad Litem,
REED HADLEY, and
DIANA LYNN GOODNER,

Respondents,

v.

CHARLES WILLARD SPEED,

Petitioner.

On Certiorari from the Supreme Court

of the State of Washington

PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is an act of a territory reviewable by the supreme court of the successor state such that the state supreme court may declare the territorial enactment null and void and thus deny the right to a trial by jury in a civil cause of action?

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OFFICIAL OPINIONS

The reported opinion in the instant case by the Washington State Court of

Appeals, Division II, can be found at 26 Wash. App. 648, 613 P.2d 1207 (1980).

The reported opinion by the Washington State Supreme Court in the instant case can be found at 96 Wash. 2d 838, ____ P.2d ____. (See Appendix A.)

GROUNDS OF JURISDICTION

The judgment which is sought to be reviewed is that of the Washington State Supreme Court which was filed on January 15, 1982. A timely Motion for Reconsideration was filed and the Order Denying the Motion for Reconsideration was dated April 28, 1982. The jurisdiction of this Court to review the decision of the Washington State Supreme Court is conferred by 28 U.S.C. §1257(3).

Because the constitutionality of the Territorial Act of 1881, an act of Congress, is drawn in question and 28 U.S.C. §2403(a) may be applicable, notice should be served on:

The Solicitor General
Department of Justice
Washington, D.C. 20530

Because the constitutionality of Washington State statutes, RCW 26.26.120(5), is in question and 28 U.S.C. §2403(b) may be applicable, notice should be served on:

Hon. Ken Eikenberry
Attorney General of the
State of Washington
Temple of Justice
Olympia, WA 98504
(206-284-5716)

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

1. U. S. Const. art. III, §1:

§1. Judicial power; tenure of office

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

2. U. S. Const. art IV, §3:

§3. Admission of new states; power over territory and other property

Section 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislature of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

3. U. S. Const. art. VI, §2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws

of any State to the Contrary notwithstanding.

4. Wn. St. Const. art. 1, §21:

§21. Trial by Jury. The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

5. Wn. St. Const. art. 4, §4:

§4. Jurisdiction. The supreme court shall have original jurisdiction in habeas corpus and quo warranto and mandamus as to all state officers, and appellate jurisdiction in all actions and proceedings, excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy, or the value of the property does not exceed the sum of two hundred dollars, unless the action involves the legality of a tax, impost, assessment, tool, municipal fine, or the validity of a statute. The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari and other writs

> necessary and proper to the complete exercise of its appellate and revisory jurisdiction. Each of the judges shall have power to issue writs of habeas corpus to any part of the state upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself, or before the supreme court, or before any superior court of the state or any judge thereof.

(Emphasis added.)

6. Revised Code of Washington 26.26.130(5):

> The trial shall be by the court without a jury. [Added by Laws 2nd Ex Sess 1975-76 ch 42 §13.]

7. Revised Code of Washington 2.04.010:

> **2.04.010 Jurisdiction.** The supreme court shall have original jurisdiction in habeas corpus and quo warranto and mandamus as to all state officers, and appellate jurisdiction in all actions and proceedings excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy or the value of the property does

not exceed the sum of two hundred dollars, unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute. The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari, and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. Each of the judges shall have power to issue writs of habeas corpus to any part of the state, upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or before the supreme court, or before any superior court of the state, or any judge thereof.

8. An Act to Establish the Territorial Government of Washington (The Organic Act, Ch. 90, §6, 10 Stat., 172 (1853): (See Appendix B).

9. An Act to . . . enable the people of . . .Washington to form constitutions and state governments and to be admitted into the Union on an equal footing with the original states . . . .

(The Enabling Act, Ch. 180, §§4, 22, 23, 25 Stat., 676 (1889): (See Appendix C).

10. Washington Territorial Code of 1881, ch. LXVI, §1078, 1214-1221: (See Appendix D).

11. Wn. St. Const. art. 2, §19:

> **§19. Bill to Contain One Subject.** No bill shall embrace more than one subject, and that shall be expressed in the title.

STATEMENT OF THE CASE

The Petitioner, Charles Willard Speed, was accused by a Complaint in 1978 of being the father of Shana Marie Goodner. The Petitioner requested a jury trial, which request was denied on the basis that the Uniform Parentage Act passed by the Washington Legislature prohibits trial by jury [See RCW 26.26.120(5)]. The Petitioner alleged that he had a constitutionally protected right to a trial by jury because citizens of the Territory of Washington had been

guaranteed that right at the time of the adoption of the Washington State Constitution. The Supreme Court of the State of Washington held to the opposite. Thus, the instant question.

The question of whether or not the Washington State Supreme Court could hold a territorial act to be null and void was raised in the Washington State Court of Appeals, which passed on the issue as follows:

> As interpreted in State ex rel. Mullen v. Doherty, 16 Wash. 382, 384, 47 P. 958 (1897), the state's constitution protects the right of trial by jury as it existed in the territory at the time the constitution was adopted. Defendant urges that, in light of the right to jury trial provided in bastardy proceedings under the Territorial Code of 1881, ch. LXVI, § 1919, he should be provided a similar right despite RCW 26.26.120(5). That portion of the Territorial Code relating to illegitimate children, however, was held to have been improperly enacted in State v. Tieman, 32 Wash. 924, 73 P. 375 (1903). The effect of that determination was to revive

> the law as it stood prior to the enactment of the Territorial Code. Boeing Co. v. State, 74 Wn.2d 82, 442 P.2d 970 (1968). Accordingly, because no right to jury trial in filiation proceedings existed at the time the state constitution was enacted, defendant does not now have a meritorious constitutional challenge to RCW 26.26.120(5).

State v. Speed, 26 Wn. App. 648, 649, 613 P.2d 1207 (1980).

The Supreme Court of the State of Washington dealt extensively with the issue (see Appendix A) of the grant of authority to state supreme courts by Congress. (96 Wash. 2d 838, 844-846.)

The specific questions presented herein can be viewed from the following facts:

1. The Organic Act, which created the Washington Territory, was passed by Congress in 1853. (See Appendix B.)

2. The Washington Territorial Code of 1881, which was passed by the territorial legislature, enacted the

Bastardy Act and gave a right of trial by jury to an accused father. (See Appendix D.)

3. The Enabling Act, approved February 22, 1889, enabled the people of the Territory of Washington to form a constitution, to be admitted as a state, and provided in Sec. 24 that "[A]ll laws in force made by said Territories, at the time of their admission into the Union, shall be in force . . . ." (See Appendix C.)

4. The Washington State Constitution was adopted in October, 1889, and provided that the right to a trial by jury shall remain inviolate. (See Wn. St. Const. art. 1, §21.)

5. The Washington State Constitution protects a right to trial by jury as it existed in the territory at the time of the adoption of the state constitution. State, ex rel. Mullen v.

Doherty, 16 Wash. 382, 384, 42 P. 958 (1897).

6. Washington became a state by presidential proclamation on November 11, 1889. (26 Stat., Proclamations, p. 10, Nov. 11, 1889.)

7. In 1903 the Washington State Supreme Court declared the Bastardy Act to be invalid. (State v. Tieman, 32 Wash. 294, 73 P. 375 (1903).)

8. In 1976 the Washington State Legislature enacted the Uniform Parentage Act which denied the right to a jury trial to accused fathers. (RCW 26.26.150(2).)

9. The Washington State Supreme Court, in deciding the constitutionality of the Uniform Parentage Act, held that since Section 22 of the 1889 Enabling Act made the Washington State Supreme Court the successor of the supreme court of the territory, the Washington State Supreme

Court had the jurisdiction to declare territorial acts invalid. The supreme court reasoned that the nullity went to the incipience of the territorial act; and, thus, there was in fact no protected right to a jury trial in the territory at the time of the adoption of the Washington State Constitution. (See Appendix A.)

Thus, if the Supreme Court of the State of Washington did not receive the authority to declare a territorial act a nullity, the right to a jury trial in Bastardy or Uniform Parentage Act cases exists as a protected right to the citizens of the State of Washington and the legislative enactment denying that right is unconstitutional.

ARGUMENT AND REASONS FOR GRANTING THE WRIT

This case presents important questions of federal law which have not

been, but should be, decided concerning the jurisdiction of successor state courts and their authority to declare acts of Congress void.

It is asserted in this petition that the Washington State Supreme Court in Tieman, supra, did not have the "jurisdiction" to invalidate an act of the federal government; i.e., the Territory of Washington. Further, it is urged that the Washington State Supreme Court has misconstrued the grant of Congress in the Enabling Act wherein it named "successor courts." This argument will proceed on three bases:

1. The grant of jurisdiction to the Supreme Court of Washington only permits review of the invalidity of Washington State statutes.

2. By federal law under the Supremacy Clause of the United States Constitution, Article VI, the state

supreme court is plainly without jurisdiction to invalidate a federal act.

3. The Washington State Supreme Court was not granted the authority to invalidate territorial acts by being named as the successor to the Washington Territorial Supreme Court.

A. Jurisdiction of State Supreme Court.

A court possesses only such jurisdictional powers as are conferred by the constitution or legislation of the sovereign under which it functions and Congress cannot vest the judicial power of the United States in state courts (20 Am. Jur. 2d Courts §91 (1965)). In Washington, the grant of jurisdiction to the supreme court is found in Article 4, Section 4, of the Washington State Constitution and in RCW 2.04.010.

Pursuant to both of those grants, the supreme court has jurisdiction over the validity of "statutes." Further, it is plainly the duty of the court to invalidate "statutes" if they contravene the state constitution (Windust v. Dept. of Labor & Ind., 52 Wash. 2d 33, 37, 323 P.2d 241 (1958).

There plainly is no grant of jurisdiction to render federal laws invalid. Thus, simply from this brief analysis, it can be seen that an attempt to invalidate an act which was not one of the sovereign, the state of Washington, is not within the jurisdiction of the state supreme court.

The authority and jurisdiction of the state supreme court could not antedate November, 1889, the date of statehood. It is not argued that the court in Tieman, supra, could not rule on "statutes" after that date, but it is

illogical to presume that the Washington State Supreme Court would have jurisdiction over acts which predated the existence of its own sovereign--the state. Thus, under the rationale of State ex rel. Mullen v. Doherty, 16 Wash. 382, 384, 47 P. 958 (1897), the right to a trial by jury existed in the territory at the time of the adoption of the constitution (October, 1889) and should still exist under the Uniform Parentage Act, RCW 26.

B. Supremacy and Territorial Clauses of U.S. Constitution.

In order to examine whether or not there was jurisdiction for the state supreme court to invalidate a territorial act, the U.S. Constitution should be examined. Two articles are important for this examination; i.e., Article VI, Clause 2--the Supremacy Clause, and

Article IV, Section 3, Clause 2--the Territorial Relations.

1. U. S. Constitution, Article IV, Section 3, Clause 2, states as follows:

> [2] The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any claims of the United States, or of any particular State.

The court's attention is invited to U.S. v. Wheeler, 435 U.S. 313, 55 L.Ed. 2d 303, 98 S.Ct. 1079 (1978), wherein the supreme court briefly explained the identifying features of a "territory" and indicated that it is an agency of the federal government:

> Similarily, a territorial government is entirely the creation of Congress, "and its judicial tribunals exert all their powers by authority of the United States." Grafton v. United States, supra, 206 U.S., at 354, 27 S.Ct., at 755; see Cincinnati Soap Co. v. United

> States, 301 U.S. 308, 317, 57 S.Ct. 764, 768, 81 L.Ed. 1122; United States v. Kagama, 118 U.S. 375, 380 6 S.Ct. 1109, 111, 30 L.Ed. 228; American Ins. Co. v. Canter, 1. Pet. 511, 542, 7 L.Ed. 242. When a territorial government enacts and enforces criminal laws to govern its inhabitants, it is not acting as an independent political community like a State, but as "an agency of the federal government." Domenech v. National City Bank, 294 U.S. 199, 204-205, 55 S.Ct. 366, 369, 79 L.Ed. 857. (at page 1085.)

In early cases, the U. S. Supreme Court dealt with the entity of a territory and set forth the law concerning them:

> The government of the Territories of the United States belongs, primarily, to Congress; and, secondarily, to such agencies as Congress may establish for that purpose. During the term of their pupilage as Territories, they are mere dependencies of the United States. Their people do not constitute a sovereign power. All political authority exercised therein is derived from the General Government.

Snow v. U.S., 85 U.S. 317, 21 L.Ed. 784, 785 (1880).

2. U. S. Constitution, Article VI, Section 2, states as follows:

> [2] This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, and under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

It is plain that all laws of the United States shall be the supreme law of the land. 16 Am. Jur. 2d Constitutional Law §74 (1979). To see how these doctrines interplay, one need look no further than Testa v. Katt, 330 U.S. 386, 91 L.Ed. 967, 67 S.Ct. 810 (1947), wherein a federal act had provided for penalty of treble damages; a state court held that a federal penal statute could not be maintained in state court. The supreme court made short shrift of that position, stating as follows:

> The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the state are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the state. Mondou v. New York, N.H. & H.R. Co., supra, 223 U.S. at page 57, 32 S.Ct. at page 178, 56 L.Ed. 327, 38 L.R.A., N.S. 44.
>
> (at p. 814).

Thus, the sovereign for the Territory of Washington was the Congress of the United States, and only Congress, its legislative courts, or the United States Supreme Court under Article II, Section 1, Clause 1, could invalidate the act of the territory. The Supreme Court

of the State of Washington could not and cannot invalidate any act of Congress!

C. The Supreme Court has Misconstrued its Jurisdiction.

1. Purpose Violated.

The Washington State Supreme Court cited two cases--Byers v. Commonwealth, 42 Pa. 89, 94 (1862), and People v. One 1941 Chevrolet Coup, 37 Cal. 2d 283, 287, 231 P.2d 832 (1951)--for the proposition that in looking for the right (to see what is preserved for jury trials) we are to examine the issue historically. Historically, socially, factually, and legally in the territory, at the time of the adoption of the constitution--there was the right to a jury trial in bastardy proceedings. The Washington State Supreme Court was not asked to enlarge the right, merely preserve it. It destroyed the right by use of a legal fiction.

2. Enabling Act Rationale Incorrect.

a. The Washington State Supreme Court in Tieman, supra, did not have to delve back to the Organic Act and rely on the Enabling Act for its authority. The court in Tieman, supra, referred to a similar provision in the Washington State Constitution (p. 296). In fact, that provision is Article 2, Section 19:

> **§19. Bill to Contain One Subject.** No bill shall embrace more than one subject, and that shall be expressed in the title.

This was adopted in 1889 in the Washington State Constitution. Thus, a correct analysis would have been:

1) The Bastardy Statute was a state statute by virtue of Sec. 24 of the Enabling Act;

2) But it was unconstitutional by

virtue of Art. 2, Section 19 of the Washington State Constitution;

3) Thus, it was null and void as of the date of either adoption of the constitution or the date of statehood.

b. The grant of Congress through the Enabling Act was to give the territory a chance to form a state by adopting a constitution, which if it met certain guidelines, would be granted statehood. Note the guidelines in Section 4 (e.g., a republican form of government, no distinction in civil rights based on race or color, etc.).

The Washington State Supreme Court in the instant case held that by naming the state courts as successors, it granted the right to construe territorial acts--even to declaring them null and void. That rationale fails on examination:

1) Section 22 clearly

indicates that as to cases arising prior to admission:

> [T]he parties to such judgment shall have the right to prosecute appeals and writs of error to the Supreme Court of the United States as they shall have had by law prior to the admission of said State into the union.

2) Section 23 reserved the right to pending civil cases to request that litigants could choose their forums--either U.S. district courts or state courts.

Thus, Congress can confer concurrent jurisdiction on state courts for enforcement of penalties, but those courts have only such powers as Congress expressly grants. Bowles v. Barde Steel Co., 177 Or. 421, 164 P.2d 692, 162 A.L.R. 328 (1945). Here, Congress did not grant the right to declare void its own act. The grant of jurisdiction was limited, and presumed statehood, and presumed that all laws would be in effect

in the states as had been in effect in the territory, "except as modified or changed by this act or by the Constutitions of the States, respectively." (Sec. 24, Enabling Act.) Nothing granted the authority to declare territorial acts void.

c. The constitution of the State of Washington defined the limit of the judicial power of the supreme court, as set forth above, to decide the validity of statutes (not territorial acts); so, the constitution was self-limiting and the authority of the Supreme Court of Washington, which only came to being on November 11, 1889, could not antedate the inception of the state itself.

Thus, three premises are obvious:

1. The Supreme Court of the State of Washington, by constitutional grant and by statute, can only decide the

validity of state statutes. In this context, Tieman, supra, could have only declared null and void the Washington State statute relating to bastardy proceedings in effect after November 11, 1889.

2. Congress, who was the sovereign of the Territory of Washington, only set forth the diagram for the state and did not grant jurisdiction to declare its own acts void.

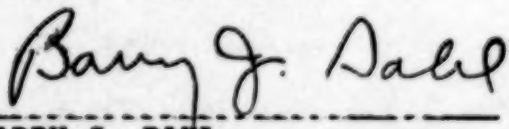
3. Historically, the right to a jury trial in bastardy proceedings was a fact; socially, it was a determination by the territorial legislature--an arm of Congress; and legally, it existed and could not be overturned by a state supreme court.

The usurpation of the authority by the Washington Supreme Court has lead to an enlargement of its authority; and it has denied the right to a jury trial to

its citizens when Congress had first guaranteed that right.

Therefore, Petitioner respectfully requests that this Court review the decision of the Washington State Supreme Court and decide the question presented by this case.

Respectfully submitted,



BARRY J. DAHL
Of Attorneys for Petitioner